LEXIS 1139

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 93-11931
LAWRENCE A. FORTNEY, JR.	)	
	)	
Debtor	)	
	)	
	)	
LAWRENCE A. FORTNEY, JR.	)	FILED
	)	at 2 O'clock & 06 min. P.M.
Plaintiff	)	Date: 8-3-95
	)	
vs.	)	Adversary Proceeding
	)	Number 94-01079A
UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE	)	
	)	
Defendant	)	
	)	

ORDER

The United States of America, Department of the Treasury, Internal Revenue Service ("IRS") by motion seeks summary judgment against debtor Lawrence A. Fortney, Jr. Prior to this adversary proceeding, Debtor filed a case under Chapter 7 of the Bankruptcy Code on November 29, 1993 and received a discharge on July 24, 1994. Debtor moved to reopen the case on December 21, 1994, simultaneously filing the complaint initiating this adversary proceeding which alleges post discharge collection efforts by the IRS of scheduled tax debts. Debtor moved to reopen the case for determination of

dischargeability of those taxes. The IRS seeks summary judgment as to nondischargeability of certain tax liabilities for the years 1985 through 1990, and dismissal of the case with respect to alleged liabilities relating to years 1983 and 1984.

This court has jurisdiction to hear this matter under 28 U.S.C. §157(b)(2)(I) (1994) and 28 U.S.C. §1334 (1994). The standard of review for a Motion for Summary Judgement is that applicable to Rule 56 of the Federal Rules of Civil Procedure ("FRCP") which is incorporated into bankruptcy practice by Federal Rule of Bankruptcy Procedure 7056. FRCP 56(a) provides that "[a] party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." The moving party bears the burden of proof that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Cowan v. J.C. Penney Co. Inc., 790 F.2d 1529 (11th Cir. 1986). Thus, "[t]o prevail on a motion for summary judgment, [the movant] must prove there is no dispute as to any material fact and based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law." Haile Co. v. Reynolds Tobacco Co. et al. (In re Haile Co.), Chapter 11 case No. 88-40864

Adv. 90-4118 slip op. at p. 5 (Bankr. S.D. Ga. Dalis, J. Sept. 27, 1991). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion]." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986). See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). As summary judgment is a drastic remedy, it should not be granted unless the movant establishes "that the other party is not entitled to recover under any discernible circumstances." Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 209 (8th Cir. 1976)(emphasis added). Accord In re Marks, 40 B.R. 614 (Bankr. D.S.C. 1984). Summary judgment is appropriate partially to resolve this matter as material dates are conclusively provided and remaining is an interpretation and application of the United States Code and relevant case law.

Debtor originally petitioned this court for protection under Chapter 13 of Title 11 United States Code on March 10, 1992, with a subsequent dismissal on August 21, 1992 (Case No. 92-10505). Debtor then filed a petition under Chapter 7 of the Bankruptcy Code sixty-three days later on October 23, 1992, with that case also

ending in dismissal on May 20, 1993 (Case No. 92-11886).[1] Debtor filed the present case on November 29, 1993, six months and nine days after dismissal of the second case.

At issue is the discharge of debtor's income tax liabilities, as well as penalties and interest thereon, for tax years 1983 through 1990. The returns for years 1985 through 1988 were filed January 23, 1991. No filing date is presented for years 1989 and 1990, however such information is not necessary to my analysis. In the original complaint, and the response by plaintiff to the motion for summary judgment, debtor presents an issue as to the discharge of tax liabilities relating to years 1983 and 1984. Although the IRS claims no liability is owed for years 1983 and 1984 and therefore dismissal of those counts is appropriate, the IRS failed to establish the date of satisfaction of the plaintiff's liability for those years.

I have held that the two-year window[2] for determining the

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[1]The court takes judicial notice of prior bankruptcy filings by the debtor and the content of those filings. Allen v. Newsome, 795 F.2d 934 (11th Cir. 1986) (district court may take judicial notice of prior habeas corpus applications filed by petitioner in proceeding on habeas corpus petition).

[2]The two-year window is established in 11 U.S.C. §523(a)(1)(B), which states [a tax is nondischargeable if]

> (B) with respect to which a return, if required- . . .
>
> (ii) was filed after the date on which the such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; . . . .

nondischargeability of certain income taxes is suspended from running during periods of the debtor's previous bankruptcy cases and for six months thereafter. In re Teeslink 165 B.R. 708, 713 (Bankr. S.D. Ga. 1994) (11 U.S.C. §108(c)(1)[3] activates six month suspension of period for collection after assessment arising under 26 U.S.C. §6503(b)[4] when assets of the taxpayer are subject to the control of

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[3]11 U.S.C. §108(c)(1) provides:

> (c) Except as provided in section 524 of this title [11], if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; . . .

[4]26 U.S.C. §6503(b) provides in pertinent part:

> (b) **Assets of taxpayer in control or custody of court.** The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the

the bankruptcy court). Under Teeslink, the two-year period is tolled while the first petition was pending and also for the intervening sixty-two days between dismissal of the first petition and the filing of the second petition.[5] The two-year period is similarly tolled for the duration of the pendency of the second case plus six months thereafter (all but nine days of the interim between the second and the third cases). March 19, 1992 is therefore the starting point from which the two-year window will extend back.[6]

Tax Liabilities for the Years 1985 Through 1988

Debtor's income tax returns for the years 1985 through 1988 were filed January 23, 1991. These returns were filed late under 26 U.S.C. §6072(a); thus the first requirement of §523(a)(1)(B)(ii) is satisfied. Further, the returns were filed within the two-year period of March 19, 1990 through March 19, 1992 (the starting point for determining dischargeability, decided above), thus satisfying the second requirement. Accordingly,

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District of Columbia, and for 6 months thereafter.

[5]Teeslink tolls the running of any period discussed therein for the shorter of six months or the actual time between multiple bankruptcy petitions. Debtor's two-year period here is tolled for the sixty-two days between the first and second filings.

[6]This date takes into consideration the fact that the two-year period of §523(a)(1)(B)(ii) does not run at all for any time from the initial filing on March 10, 1992 to the present third filing, except for nine days between the second and third filings. The calculation of the date from which to measure the two-year period in Debtor's brief fails to consider that the period between the dismissal of the first petition and the filing of the second is clearly within the period established by Teeslink during which the two-year period does not run.

summary judgment determining tax liabilities for the years 1985 through 1988 excepted from the debtor's discharge under §523(a)(1)(B)(ii) is appropriate. Interest on pre-petition and post-petition nondischargeable tax liabilities is likewise nondischargeable. Teeslink, supra at 717.

Tax Liabilities for the Years 1989 and 1990

Bankruptcy Code §523(a)(1)(A) provides another basis for excepting certain taxes from discharge.[7] If the tax liability qualifies as a priority claim under §507(a)(2) or §507(a)(7)[8], the claim is excepted from discharge under §523(a)(1)(A). Generally, taxes relating to taxable years ending within three years of the filing of the petition qualify for priority status. 11 U.S.C. §507(a)(7)(A)(i). The three-year window of §507(a)(7)(A)(i)[9] is

[7]11 U.S.C. §523(a)(1)(A) provides in pertinent part:

> (a) A discharge under section 727 . . . of this title [11] does not discharge an individual debtor from any debt --
>
> (1) for a tax . . . --
>
> (A) of the kind specified in section 507(a)(2) or 507(a)(7) [507(a)(8) under the Bankruptcy Code as amended October 22, 1994] of this title [11]; whether or not a claim for such tax was filed or allowed . . .

[8]11 U.S.C. §507(a)(7) is now renumbered as §507(a)(8) under the Bankruptcy Code as amended October 22, 1994.

[9]The current §507(a)(8) provides [priority status for]

> (8) . unsecured claims of governmental units, only to the extent that such claims are for--

suspended during the pendency of a debtor's prior cases as well as six months thereafter. Teeslink, supra at 713. The same starting point for determining the dischargeability of tax liabilities is used under both §523 and §507, specifically March 19, 1992 in this case. Taxes due for years 1989 and 1990 fall within the three-year window of March 19, 1989 through March 19, 1992 and thus summary judgment is appropriate for determining taxes due for years 1989 and 1990, together with interest thereon, nondischargeable as priority tax claims. Teeslink, supra at 717.

Tax Liabilities for the Years 1983 and 1984

Debtor's complaint and subsequent response to motion for summary judgement seek to have all tax debts relating to 1983 and 1984 declared discharged. Debtor would then have the IRS reallocate payments made relating to those years to other nondischargeable years. Although the IRS has disavowed any claim relating to those tax years, determination of dischargeability for tax years 1983 and 1984 remains open. The declaration of Dorothy Napolitano submitted in support of the IRS's motion for summary judgment states:

> 6. The computer records of the IRS, as shown on exhibit "A" [sic], evidence that debtor's federal income tax liabilities, plus statutory additions, for the years 1983 and 1984 have been fully satisfied.

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(4)(A) tax on or measured by income or gross receipts--

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition; . . . .

The exhibit designated "government exhibit 1," as it pertains to 1983 and 1984 tax liability is indecipherable by me. If any federal income tax liability for 1983 and 1984 was satisfied prior to the present Chapter 7 case filed November 29, 1993 to which the debtor received a discharge, the IRS would be correct in its assertion that dismissal is appropriate as to these counts. However, to the extent that the IRS received payment on the 1983 and 1984 tax liability after November 29, 1993, a determination must be made as to whether the tax obligations then remaining due for 1983 and 1984 were dischargeable, requiring reallocation of those payments. Under the facts now before me, I cannot determine that as to 1983 and 1984 liability the plaintiff could not recover under any discernable circumstance. Robert Johnson Grain Co., supra at 209.

Penalties and Related Interest

It is generally true that fines and penalties assessed by the IRS are excepted from discharge by virtue of 11 U.S.C. §523(a)(7), nevertheless an exception is made for certain tax penalties.[10] The meaning and application of §523(a)(7) is settled

[10]11 U.S.C. §523(a) provides an exception to discharge:

(7) the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty--

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

in this Circuit. The "plain" language of the section means what it says and certain tax penalties may be discharged under either §523(a)(7)(A) or §523(a)(7)(B). In re Burns, 887 F.2d 1541, 1544 (11th Cir. 1989); see also McKay v. U.S., 957 F.2d 689, 693-94 (9th Cir. 1992); In re Roberts, 906 F.2d 1440, 1442 (10th Cir. 1990).

A strict reading of §523(a)(7)(B) finds tax penalties dischargeable where the "transaction or event" giving rise to the penalty occurs more than three years before the filing of the petition. Following my decision in Teeslink, the date from which the three-year period is calculated must take into account prior filings by the same debtor as well as a six month period following each filing. Teeslink, supra at 717. The same analysis is therefore required under §523(a)(7)(B) as that used for §523(a)(1)(B)(ii) and §507(a)(7)(A)(i) above. Id.; see also In re Stoll, 132 B.R. 782 (Bankr. N.D. Ga. 1990) (holding the three year period of §507(a)(7)(A)(i), two year period of §523(a)(1)(B)(ii), and three year period of §523(a)(7)(B) are all suspended during period of a prior case's pendency). In this case, the starting point for determining dischargeability is March 19, 1992. It follows that any penalty imposed with respect to a transaction or event occurring prior to March 19, 1989 is then discharged.

When did the "transaction or event" occur giving rise to

"While the language of this subsection frames nondischargeable tax penalties as an exception to an exception to an exception, once the triple negative is taken into account the meaning of the provision gains clarity." In re Burns, 887 F.2d 1541, 1544 (11th Cir. 1989).

the penalty? The due date of the return[11] is the date the "transaction or event" occurs for which certain penalties are imposed. Teeslink, supra at 717 (failure to file and failure to pay); In re Fox, 172 B.R. 247, 250 n.5 (Bankr. E.D. Tenn. 1994) (negligence and late filing penalties); Stoll, supra at 787 (late payment). "Despite the fact that tax returns might facilitate the calculation of penalties, it is apparent from this decision that penalties can be assessed without returns. Therefore it is logical to conclude that tax returns do not trigger the application of §523(a)(7)(B)." Stoll, supra at 787 (referring to In re Roberts, 906 F.2d 1440 (10th Cir. 1990)). For purposes of §523(a)(7)(B), a penalty for underpayment of estimated tax is no different from penalties for negligence, late filing and late payment so that for all these named penalties, the due date of the return is the date the "transaction or event" occurs. Accordingly, the above-named penalties relating to tax years 1987 and earlier are discharged because such penalties would have been triggered at the latest by the return due on April 15, 1988, which is prior to the March 19, 1989 cutoff for nondischargeability. Interest on those dischargeable penalties, although not specifically covered by statute, is likewise discharged. Teeslink, supra at 718. Complete summary judgment for defendant on this count of plaintiff's complaint is therefore unavailable. I will, however, grant summary

[11]A return is due generally on the 15th day of April following the close of the calendar year. 26 U.S.C. §6072(a) (1994).

judgment for defendant to the extent of the named penalties and associated interest relating to tax years 1988 and beyond because the event triggering those penalties occurred at the earliest on the due date of the 1988 return, April 15, 1989, which is within the 3-year nondischargeability period commencing March 19, 1989.

Plaintiff shall be granted summary judgment as to the dischargeability of penalties and related interest for tax years 1987 and earlier, notwithstanding the failure to file a cross motion for summary judgment.[12]

It is therefore ORDERED that partial summary judgement is GRANTED to the IRS determining tax liability and interest accrued thereon for the years 1985 through 1990 not discharged in plaintiff's Chapter 7 case; and further

ORDERED that the IRS request for summary dismissal with respect to tax liabilities relating to tax years 1983 and 1984 is DENIED; and further

ORDERED that partial summary judgment is GRANTED to the IRS determining tax penalties and interest thereon for tax years

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[12]Summary judgment may be granted in favor of a party opposing the motion of summary judgment, despite the lack of an appropriate cross motion. Bosarge v. U.S. Dep't of Educ., 5 F.3d 1414, 1416 n.4 (11th Cir. 1993), cert. denied 114 S.Ct. 2720, 129 L.Ed.2d 845, 1994 U.S. LEXIS 4778 (1994); Lindsey v. U.S. Bureau of Prisons, 736 F.2d 1462, 1463 (11th Cir. 1984), vacated on other grounds, remanded, 469 U.S. 1082, 105 S.Ct. 584, 83 L.Ed.2d 695 (1984); 10A Wright, Miller & Kane, Federal Practice and Procedure § 2720 (1995) ("the weight of authority is that summary judgement may be rendered in favor of the opposing party even though he has made no formal cross motion under Rule 56"). Contra Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1556 (11th Cir. 1991), aff'd 113 S.Ct. 1732, 123 L.Ed.2d 387, 1993 U.S. LEXIS 2982 (1993).

1988 and later not discharged in plaintiff's Chapter 7 case; and further

ORDERED that summary judgment is DENIED to the IRS as to the nondischargeability of tax penalties and interest thereon for tax years 1987 and earlier; and further

ORDERED that plaintiff Lawrence A. Fortney, Jr. is GRANTED summary judgment determining tax penalties and interest thereon for tax years 1987 and earlier discharged in his Chapter 7 case.

The clerk shall issue notice of trial on the remaining issues of dischargeability of 1983 and 1984 tax years and the amounts remaining due and discharged.

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JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 3rd day of August, 1995.